Supreme Court, U.S.
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No. 04-779

IN THE

Supreme Court of the United States

ALFRED SKERLE,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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The Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the Supreme Court of Pennsylvania dated November 30, 2004.

COUNTER-STATEMENT OF CASE

A. Procedural History

On June 24, 1994, Petitioner, Alfred Skerle, was arrested by the Doylestown Township Police Department and charged with one count of Aggravated Indecent Assault, and three counts each of Indecent Assault, Corruption of Minors, and Endangering the Welfare of Children for sexually assaulting a 12-year-old female, a friend of Petitioner's daughter.

On October 3, 1994, Petitioner entered an open guilty plea to all charges and was sentenced to not less than eleven and one half (11½) nor more than twenty-three (23) months incarceration in the Bucks County Correctional Facility, a sentence below the mitigated range of the guidelines. V. Paul Bernanrdino, III, represented Petitioner at the time of his plea and sentencing.

On October 7, 1994, Petitioner filed a Petition for Reconsideration of Sentence and/or for Work Release. On October 28, 1994, the petition was denied. However, on May 31, 1995 and June 8, 1995, the Trial Court entered Orders approving Appellant for work release. No direct appeal was taken.

Petitioner was paroled on September 18, 1995, and his maximum sentence expired on September 3, 1996.

On July 25, 2003, nine years after the final judgment of sentence and nearly seven years after the expiration of his sentence, Petitioner filed his *pro se* Petition for Withdraw of Guilty Plea and Expunge Record of 11½ Month Prison Time. Based on the issues raised in his petition, the Bucks County Court of Common Pleas considered the petition as a request under the Post Conviction Relief Act, 42 Pa C.S.A. § 9541, *et seq*. By Order dated August 5, 2003, the PCRA court held that the petition was time-barred and not cognizable under the Act, and dismissed it for lack of jurisdiction.

On February 17, 2004, the Superior Court of Pennsylvania affirmed the decision of the PCRA court.

On February 27, 2004, Petitioner filed a *pro se* Petition for Rehearing En Banc. On March 9, 2004, the Commonwealth filed its Answer in Opposition to Appellant's Petition. On April 23, 2004, the Superior Court of Pennsylvania denied Petitioner's application.

Petitioner filed a Petition for Writ of Certiorari to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied allocatur on November 30, 2004.

The instant *pro se* petition for writ of Certiorari to the United States Supreme Court now follows.

B. Factual History

At the time of these offenses, Petitioner, Fred Skerle, was the 43-years-old divorced father of three daughters, living at 3247 Bristol Road in Doylestown Township, Bucks County, Pennsylvania. Petitioner lived in his home with his eldest daughter. The other three children lived with his

ex-wife, but visited Petitioner at least every other weekend. The female victim, then 12 years old, was a friend of one of the daughters, and often spent the night in the Petitioner's home on weekends when he had visitation rights.

In June of 1994, the victim reported to the Doylestown Township Police Department that on three (3) separate occasions, beginning in January of 1994, she and Petitioner had sexual contact at his residence when Petitioner was the only adult present in the home. The victim reported that when she slept over at Petitioner's house, she usually slept on the couch in the living room, or she and Petitioner's daughter would sleep in a camper in the rear yard of the residence.

The victim described the first incident as occurring during one of her overnight stays at the Petitioner's residence. As the victim and Petitioner, who wore only a towel type wrap, lay in the Petitioner's bed watching a rented movie, the victim rubbed Petitioner's penis.

The second incident, which occurred one to two weeks after the first incident, also took place in Petitioner's bedroom. As the victim lay with Petitioner on his bed watching television, Petitioner undid his belt and pant snap before unzipping his pants. Believing that Petitioner wanted her to repeat her actions from the first incident, the victim rubbed Petitioner's penis for approximately one hour

The third sexual contact occurred approximately one to two weeks after the second incident. The victim describes sleeping over at Petitioner's house in the camper with the Petitioner's daughter. Since they were alone in the back of the residence, Petitioner offered to stay with them until they fell asleep. Petitioner climbed into bed with the victim and

his daughter, placing himself between the wall of the camper and the victim. The victim rubbed Petitioner's penis while Petitioner put his hand inside of the victim's underwear, rubbed her vagina and inserting the tip of his finger inside of her vagina.

Police interviewed Petitioner on June 8, 1994. Petitioner admitted to police that he had sexual contact with the 12-year-old victim on three separate occasions. Petitioner, however, advised that the first contact occurred before Christmas 1993, the second in February 1994, and the third sexual contact happened toward the end of April 1994.

REASONS FOR DENYING THE PETITION

I. The Judgment Made By The State Court Rests Entirely On Adequate And Independent State Grounds, Does Not Involve A Single Federal Issue, And Contains No Compelling Reason For Review To Be Granted.

The review on a Writ of Certiorari by the United States Supreme Court is a matter of judicial discretion, granted only for compelling reasons. Pursuant to United States Supreme Court Rule 10, the following factors are considered when determining whether to grant review:

> (1) Whether a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed

from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(2) Whether a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or

(3) Whether a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Before the Supreme Court will review a decision of a state court it must affirmatively appear from the record that a federal question was presented to the highest court of the state having jurisdiction and that its decision of that federal question was necessary to its determination of the cause. In cases where the decision of the state court might have been made either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. *Woods v. Nierstheimer*, 328 U.S. 211, 66 S. Ct. 996, 90 L. Ed. 1177 (1946); *Mellon v. O'Neil*, 275 U.S. 212 (1927); *William v. Kaiser*, 323 U.S. 471 (1945).

The instant case was decided by a state court in accordance with the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. § 9501, *et seq.* The PCRA court found that the Petition was untimely, and as such, lacked jurisdiction. Additionally, the PCRA court found the petition was not otherwise cognizable under the Act. As the judgment rested on adequate and independent state grounds and did not involve a single federal issue, this Petition for a Writ of Certiorari should be denied.

A. The PCRA Court Properly Dismissed Petitioner's "Petition For Withdraw Of Guilty Plea And Expunge Record Of 11½ Months Prison Time" As Untimely.

Petitioner claims in his petition for a writ of certiorari before this Honorable Court, that his guilty plea was improperly accepted for what he characterizes as an improper colloquy. This claim was raised by Petitioner in his "Petition for Withdraw of Guilty Plea and Expunge Record of 11½ Months Prison Time" to the Bucks County Court of Common Pleas. The Court properly concluded that these claims were subsumed within the Post Conviction Relief Act, 42 Pa. C.S.A. § 9501, *et seq.* The PCRA is "the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies ... including habeas corpus and corum nobis." 42 Pa. C.S.A. § 9542.

The Court found, under the PCRA, that Petitioner's claims were time barred and as such the Court lacked jurisdiction. Petitioner appealed to the Pennsylvania Superior Court, which affirmed the Court of Common Pleas, also finding the claims to be untimely. Subsequently, the Pennsylvania Supreme Court denied Writ.

The Pennsylvania Supreme Court properly denied Petitioner's Writ. As noted above, it was dismissed due to un-timeliness pursuant to the jurisdictional requirements of the PCRA. 42 Pa. C.S.A. § 9545(b); *see also Commonwealth v. Breakiron*, 781 A.2d 94 (2001); *Commonwealth v. Baldwin*, 789 A.2d 728 (2001); *Commonwealth v. Lark*, 746 A.2d 585 (2000); *Fahy*, 737 A.2d 214; *Commonwealth v. Peterkin*, 722 A.2d 638 (1998); *Commonwealth v. Kutnyak*, 781 A.2d 1259 (2001); *Commonwealth v. Alcorn*, 703 A.2d 1054 (1997), *allocatur denied.*

Pursuant to the 1995 amendments to the Post Conviction Relief Act, any PCRA petition must be filed within one year from the date a judgment of sentence becomes final. 42 Pa .C.S.A. § 9545(b)(1). "A judgment of sentence becomes final once an appellant's means of direct review of a conviction, including discretionary review in the Supreme Court of the United States or the Supreme Court of Pennsylvania, have concluded or the time limits for seeking a direct appeal have expired." *Commonwealth v. Tedford*, 781 A.2d 1167, 1170-71 (Pa. 2001). If the judgment of sentence became final before the effective date of the amendments, a petition must be filed within one year of the effective date of January 15, 1996. 42 Pa. C.S.A. § 9545(b).

On October 2, 1994, following the entry of his guilty plea, Petitioner was sentenced to a term of imprisonment for not less than eleven and one-half (11½) nor more than twenty-three (23) months in the Bucks County Correctional Facility. On October 28, 1994, his "Request for Reconsideration of Sentence" was denied. Since Petitioner filed no direct appeal, his judgment of sentence became final on November 27, 1994. The filing of Petitioner's PCRA petition on July 25, 2003, nearly nine years after the final judgment of sentence,

is clearly more than one year after the effective date of the 1995 amendments to the Post Conviction Relief Act.

Petitioner claims in his Writ to this Honorable Court that he is entitled to relief, and in support thereof he alleges that the Pennsylvania Supreme Court erred in applying the PCRA, as amended in 1995, to his petition. Petitioner asserts that the denial of his petition was "through the use of an Ex Post Facto law."

The 1995 PCRA amendments contains an exception to the time for filing a PCRA petition which applies to cases in which the judgment of sentence became final before the modifications to the PCRA were enacted. It was the intention of the legislature to permit an otherwise untimely first PCRA petition to be filed within one year following the effective date of the 1995 PCRA amendments. Applying the PCRA to Petitioner's case does not constitute a Ex Post Facto law because the modified timing requirements of the PCRA are procedural and therefore do not fall within the categories of retrospective laws prohibited by the Ex Post Facto Clause. *See Commonwealth v. Peterkin*, 554 Pa. 547, 558, 722 A.2d 638, 643 (1998) (citing *Commonwealth v. Young*, 536 Pa. 57, 637 A.2d 1313 (1993); *Commonwealth v. Johnson*, 1999 Pa. Super 128, 732 A.2d 639 (1998). The ex post facto clauses of State and Federal constitutions are virtually identical and the standards applied to determine an ex post facto violation under the Pennsylvania Constitution and the United States Constitution are comparable. *See Commonwealth v. Young*, 536 Pa. 57, 66, 637 A.2d 1313, 1317 (1993); *see also Commonwealth v. McElhenny*, 329 Pa. Super. 240, 478 A.2d 447 (1984). Consequently, the PCRA court properly applied the PCRA timing requirement to Petitioner's case.

The only exceptions to the one-year filing requirement involve "government interference, after-discovered facts or evidence and an-after recognized constitutional right." *Commonwealth v. Johnson*, 841 A.2d 136, 139 (2003) (citing 42 Pa. C.S.A. § 9545(b)(1)(i)(ii)(iii)). To qualify for any of these exceptions, a petitioner must "not only satisfy the substantive requirements of the savings provision, but must also file a petition invoking such exception within 60 days of the date the claim could have been filed." *Commonwealth v. Fahy*, 737 A.2d 214, 220 (1999); *Commonwealth v. Henry*, 706 A.2d 313, 321 (1997).

Petitioner did not allege nor prove that one or more of the enumerated exceptions to the timeliness requirements apply in this case. *See* 42 Pa. C.S.A. § 9542(b). Petitioner did not claim and cannot claim that the untimely filing of his petition was as a result of interference from government officials. Petitioner did not claimed and cannot claim that the facts and averments underlying his claims were unknown to him and could not have been ascertained through the exercise of due diligence. Petitioner did not claimed and cannot claim that the rights asserted involve constitutional rights recently recognized by the United States or Pennsylvania Supreme Courts that have been held to have retroactive application. As Petitioner's PCRA petition was time barred, the Bucks County Court of Common Pleas was without jurisdiction to entertain his petition. 42 Pa. C.S.A. §§ 9545(a) and (b); *Commonwealth v. Austin*, __ Pa. Super. __, 721 A.2d 375, (1998); *Commonwealth v. Alcorn*, __ Pa. Super. __, 703 A.2d 1054 (1997), allocatur denied.

B. The PCRA Court Properly Dismissed Petitioner's "Petition For Withdraw Of Guilty Plea And Expunge Record Of 11½ Months Prison Time" As Petitioner Was Not Currently Serving A Sentence And Therefore Was Ineligible For Relief Under The PCRA.

To be eligible for relief under the Post Conviction Relief Act, Petitioner must plead and prove that he "has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted ... currently serving a sentence of imprisonment, probation or parole for the crime." 42 Pa. C.S.A. § 9543(a)(1)(i). As previously noted, Petitioner's maximum sentence expired on September 3, 1996. Petitioner had filed his PCRA petition on July 25, 2003. Consequently, the PCRA Court properly dismissed the petition without a hearing, as Petitioner was ineligible for relief under the PCRA.

C. The PCRA Court Properly Dismissed Petitioner's "Petition For Withdraw Of Guilty Plea And Expunge Record Of 11½ Months Prison Time" As Being Not Cognizable.

Petitioner also requested relief in the form of expungement of his criminal conviction. However, the PCRA Court had no authority to do so as Petitioner stands convicted of these offenses, and the circumstances of this case in no way meet the limited circumstances for expungement found at 18 Pa. C.S.A. § 9122. *See Commonwealth v. Wolf*, __ Pa. Super. __, 704 A.2d 156 (1997); *Commonwealth v. Magdon*, 310 Pa. Super. 84, 456 A.2d 194 (1983); *Commonwealth v. Cremins*, 356 Pa. Super. 449, 514 A.2d 945 (1986). Additionally, as noted by the Pennsylvania Superior Court, "a request to expunge a criminal record is not properly brought under the Pennsylvania Post

Conviction Relief Act, 42 Pa. C.S.A. §§ 9541-9546, *et seq.* Rather it must be filed under the Pennsylvania Criminal Records Information Act 18 Pa. C.S.A. §§ 9101-9183, *et seq.*

Based on the above, it is clear that there is no compelling reason for this Honorable Court to grant discretionary review of the Petitioner's Writ of Certiorari as no federal question was presented to the Pennsylvania Supreme Court and the judgment rested entirely upon adequate and independent state grounds.

Therefore, Petitioner is not entitled to relief.

CONCLUSION

Wherefore, for the aforementioned reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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